

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MAYNOR DAVIS BROCK, III

Claimant

VS.

WEAVER'S A-OK EXTERMINATORS

Respondent

AND

COMMERCE & INDUSTRY INSURANCE COMPANY

Insurance Carrier

Docket No. 1,016,295

ORDER

Respondent and its insurance carrier (respondent) appealed the July 1, 2004 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

Claimant alleges he injured his right upper extremity, including his shoulder, while working for respondent. In the July 1, 2004 Order, Judge Hursh awarded claimant temporary total disability benefits.

Respondent contends the award of temporary total disability benefits is not in accordance with the facts presented and that the award must be vacated. Respondent requests that either the Board determine whether accommodated work was offered by respondent and rejected by claimant or remand the matter to the Judge for further proceedings.

Claimant contends the Board does not have jurisdiction to review the preliminary hearing Order and requests that respondent's appeal be dismissed. Claimant also requests that sanctions be assessed against respondent under K.S.A. 44-536a for "this frivolous filing."¹

The issues before the Board on this appeal are:

1. Does the Board have jurisdiction to review the Judge's finding that claimant meets the definition of being temporarily and totally disabled?

¹ Claimant's Brief at 3 (filed Aug. 5, 2004).

2. Should sanctions be assessed against respondent under K.S.A. 44-536a?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes this appeal should be dismissed.

This is an appeal from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing findings is limited to the following issues:

- (1) Did the worker sustain an accidental injury?
- (2) Did the injury arise out of and in the course of the worker's employment?
- (3) Did the worker provide the employer with timely notice of the accidental injury and timely written claim for workers compensation benefits?
- (4) Has the employer established a defense that defeats the claim?²

Additionally, the Board may review those preliminary hearing orders in which it is alleged the judge has exceeded his or her jurisdiction or authority in granting or denying the relief requested.³

Respondent contends the award of temporary total disability benefits is not in accordance with the facts presented. That issue is not one of the issues enumerated above and the Judge did not exceed his jurisdiction by awarding temporary total disability benefits. The Board does not have jurisdiction from an appeal of a preliminary hearing order to reweigh evidence of whether a worker meets the definition of being temporarily and totally disabled. Accordingly, respondent's appeal should be dismissed. Respondent may reserve the issue for the time of final award.

Claimant requests that sanctions be assessed against respondent under K.S.A. 44-536a. That issue has not been presented to the Judge and, in this instance, the Board declines to address it without proper notice of a hearing before the Judge to allow respondent an opportunity to be heard. K.S.A. 44-536a provides, in part:

(b) Except when otherwise specifically provided by rule and regulation of the director, pleadings need not be verified or accompanied by an affidavit. The signature of a person constitutes a certificate by the person (1) that the person has read the pleading, (2) that to the best of the person's knowledge, information and belief formed after reasonable inquiry, the pleading is well grounded in fact and is

² K.S.A. 44-534a(a)(2).

³ K.S.A. 2003 Supp. 44-551(b)(2)(A).

warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and (3) that the pleading is not imposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of resolving disputed claims for benefits.

. . . .

(d) If a pleading, motion or other paper provided for by the workers compensation act is signed in violation of this section, the administrative law judge, director or board, upon motion or upon its own initiative **upon notice and after opportunity to be heard**, shall impose upon the person who signed such pleading or a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including reasonable attorney fees. (Emphasis added.)

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing on the claim.⁴

WHEREFORE, the Board dismisses respondent's appeal of the July 1, 2004 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

IT IS SO ORDERED.

Dated this ____ day of August 2004.

BOARD MEMBER

c: Keith L. Mark, Attorney for Claimant
William G. Belden, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁴ K.S.A. 44-534a(a)(2).